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FEDERAL COMMUNICATIONS COMMISSION
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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

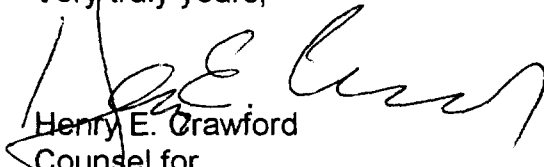
Re: In the Matter of Reexamination of the
Policy Statement on Comparative
Broadcast Hearings
RM-7739, RM-7740, RM-7741
GC Docket No. 92-52

Dear Mr. Caton:

Transmitted herewith on behalf of Miracle Radio, Inc. are an original and nine (9) copies of its "Comments of Miracle Radio, Inc." as directed to the Commission.

Should any additional information be required, please contact this office.

Very truly yours,


Henry E. Crawford
Counsel for
Miracle Radio, Inc.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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OFFICE OF SECRETARY

In the Matter of)

Reexamination of the Policy)
Statement on Comparative)
Broadcast Hearings)

GC Docket No. 92-52

RM-7739

RM-7740

RM-7741

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

COMMENTS OF MIRACLE RADIO, INC.

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July 21, 1994

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SUMMARY

Miracle Radio, Inc. ("Miracle Radio") argues in its comments that the Commission's AM daytimer preference should be maintained and strengthened.

The policy considerations underlying the AM daytimer preference are still very much present. If anything, the plight of AM daytimers has worsened with the downturn in the economy and the proliferation of FM stations in the wake of Docket 80-90. Fairness and the public interest dictate that the Commission recognize and address this inequity.

The fact that the AM daytimer has served the community of license for at least three years makes the preference objective and verifiable while also providing a high degree of confidence that the proposed station will be operated in the public interest. Furthermore, the preference suffers from none of the speculation and guesswork inherent in the concept of integration.

In sum, Miracle Radio submits that the AM daytimer preference should be maintained and given a stronger weight equivalent to a renewal expectancy. Anything less would be unfair when compared to the ease with which FM stations are able to upgrade their facilities. Moreover, only a fully dispositive preference will insure that the preference is actually awarded to worthy parties and not lost in the risky and often highly charged environment of comparative litigation.

BEFORE THE
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WASHINGTON, D.C.

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)	

To: The Commission

COMMENTS OF MIRACLE RADIO, INC.

Miracle Radio, Inc. ("Miracle Radio"),¹ by counsel, respectfully submits its *Comments of Miracle Radio, Inc.* in response to the *Second Further Notice of Proposed Rulemaking* ("Second Notice of Proposed Rulemaking") released in the above-captioned matter on June 22, 1994. In support thereof, the following is stated:

I. INTRODUCTION

1. On June 22, 1994, the Commission released the Second Notice of Proposed Rulemaking seeking comments to determine what objective and rational criteria should be used in evaluating comparative qualifications in light of Bechtel v. FCC, 10 F. 3d 875 (D.C. Cir. 1993).² Miracle Radio respectfully submits that the Commission's AM daytimer preference, when freed from the yoke of integration, presents an objective and rational criteria that should be used by the Commission in analyzing comparative cases.

¹ Miracle Radio is the licensee of AM daytime only station WSWL, Pensacola, Florida. It is also a competing applicant in Pensacola Radio Partners, et. al., MM Docket 90-406, BPH-880324NU.

² Second Notice of Proposed Rulemaking, p. 1, ¶ 7.

II. THE COMMISSION SHOULD RETAIN AND STRENGTHEN THE AM DAYTIMER PREFERENCE

A. The Public Interest Concerns Underlying the AM Daytimer Preference Remain In Force

2. The Commission instituted the AM daytimer preference in FM Broadcast Assignments, 101 FCC 2d 638 (1985), following a four year process of considering ways to aid daytime-only AM licensees.³ The Commission found that:

- a) AM daytimers were unique among all broadcast licensee since only AM daytimers are limited in operating from sunrise to sunset;
- b) AM daytimers could not take advantage of potential nighttime revenue; and
- c) the Commission's strong policy of aiding those licensees was limited by technical considerations to only partial remedies.

FM Broadcast Assignments, 101 FCC 2d 638, 643 ¶ 13. Those findings have not changed. If anything, the outlook for AM daytimers has darkened with the overabundance of FM stations resulting from Docket 80-90 and the general economic downturn of the past few years.⁴

3. An additional rationale for the AM daytimer preference was the Commission's understanding that:

positive recognition of the efforts of these licensees in operating limited facilities encourages all licensees to maximize the provision of service to the public,

³ FM Broadcast Assignments, 101 FCC 2d 638, 639 ¶ 2.

⁴ See, Radio Moultrie, Inc., 8 FCC Rcd 4266 (MMB 1993) ¶ 6 (Commission reduces forfeiture from \$10,000.00 to \$1,000.00 in recognition of hardships faced by AM daytimer).

notwithstanding the nature of any obstacles attendant to such operations.

FM Broadcast Assignments, 101 FCC 2d 638, 643 ¶ 13. This rationale is important in this day of communications speculators and applicants who look only toward selling the license at a profit. In contrast, the AM daytimer preference is awarded only to licensees who have toiled in the face of hardship to construct and maintain their facilities. It creates an incentive for conduct that is worthy of emulation by all Commission licensees.

4. In sum, Miracle Radio respectfully maintains that the policy considerations underlying the Commission's initial decision to award the AM daytimer preference are still very much in force. Consequently, it would be in the public interest for the Commission to maintain and enhance this valuable tool for remedying the inequities faced by AM daytimers.

B. The AM Daytimer Preference is in Accord with *Bechtel*

1. The Preference is Entirely Separable from Integration

5. The Bechtel court held integration of ownership into management to be an unlawful criteria. The AM daytimer preference, however, stands alone as the most objective and separable aspect of that now defunct doctrine. Whereas integration was largely a guessing game to determine if people with no track record would work at a proposed station for some pledged amount of hours, the AM daytimer preference requires that the applicant own and operate the station in the community of license for at least three years prior to applying.⁵ That three year ownership period is substantial and completely verifiable.

⁵ FM Broadcast Assignments, 101 FCC 2d 638, 646 ¶ 21.

6. There never was any real connection between the AM daytimer preference and integration. A review of FM Broadcast Assignments shows that it was artificially grafted onto integration as an “upgrade” to the sub-category of broadcast experience.⁶ However, there is nothing inherent in any of the Commission’s rationales for establishing the preference that was logically related to pledging to work at the future FM station for some given amount of hours per week. The AM daytimer had been in the community for three years, had operated the station in the face of extreme difficulties and was without a viable remedy before the Commission. Grafting these concerns onto a theoretical pledge to work at a future station, if anything, degraded the preference.

7. The mischief arising from the artificial graft of the AM daytimer preference onto integration was well illustrated in Media West Broadcast Group, Inc., 8 FCC Rcd 3649 (1993). There, competing applicants attempted to weaken the preference by applying the “conflicting obligations” doctrine of Naguabo Broadcasting Co., 6 FCC Rcd 4879 (1991) and its progeny.⁷ According to the conflicting obligations doctrine, a future pledge to work at the station is suspect where the applicant has an existing business or obligation, but does not have a clear plan for reconciling that business with the pledge to work at the future station. Thus, according to the competing applicants, the AM daytimer applicant should have lost integration credit for operating both stations during the authorized three year transition period.

⁶ FM Broadcast Assignments, 101 FCC 2d 638, 645 ¶ 20.

⁷ Media West Broadcast Group, Inc., 8 FCC Rcd at 3650 ¶ 9.

8. The Commission rejected the attempt of competing applicants in Media West Broadcast Group, Inc.⁸ Importantly, unlike the raw pledges of other applicants, the AM daytimer has already given substantial service to the community. The licensee will also have to run both facilities until the divestiture of the AM station. The community is served both before and after the application and grant of the construction permit. Therefore, it is ludicrous to scrutinize the AM daytimer preference through the same lens as “integration.” The AM daytimer preference was based on other rationales that are conceptually distinct from the integration doctrine.

9. The parties commenting in the original proceeding to add the AM daytimer preference contemplated remedies separate from the idea of integration credit. Some parties argued for a credit that would rival 100% integration while others cast it as being the equivalent of a “renewal expectancy”.⁹ Miracle Radio will later argue that the latter “renewal expectancy” model is more befitting the AM preference. However, for present purposes, it is important to realize that the AM daytimer preference was originally conceived as separate from integration even in terms of implementation.

10. The AM daytimer preference is not conceptually tied to integration in any way. It can be justly awarded to parties without any guesswork about principals working at a future station. It is a fully objective criteria since the daytime only station stands on its record of demonstrated broadcast service of at least three years in length. Therefore, the AM daytimer preference is free of the confused aspects of the integration criteria while possessing a clear positive advantage in terms of objectivity.

⁸ Media West Broadcast Group, Inc., 8 FCC Rcd at 3650 ¶ 12.

⁹ FM Broadcast Assignments, 101 FCC 2d 638, 641 ¶ 7.

2. The Daytimer Preference is Predictive of Future Operation in the Public Interest

11. The Bechtel court was critical of the Commission for largely ignoring the broadcast experience of the applicants. It pointed out that:

...it is hard to imagine that anyone seriously interested in "picking winners" would so heavily downgrade the contestants' track records.

Bechtel v. FCC, 10 F 3rd 875 at 884. The AM daytimer, however, not only possesses a track record of actual broadcast experience, that experience is one of service to the community itself. Additionally, that experience has been hardened by having to compete using limited facilities. Consequently, the broadcast experience possessed by a community based AM daytimer is highly predictive of broadcasting in the public interest.

12. In sum, the AM daytimer preference is separate from those aspects of integration found objectionable by the Bechtel court. Moreover, the AM daytimer preference provides both objectivity and predictability to the decision making processes. Therefore, the Commission should retain the AM daytimer preference in comparative proceedings.

C. The Weight to be Afforded the Preference

1. A Preference Equal to a Renewal Expectancy Would be in the Public Interest

13. Miracle Radio submits that the AM daytimer preference should be equal to a renewal expectancy. An AM daytimer station, having to bear the risks inherent in a comparative proceeding should at least have the advantage of entering the proceeding with a fully dispositive preference that will prevail

against all other competing applicants unless the AM daytimer is justly disqualified for other reasons.

14. The fairness of a decisional preference is obvious when compared with the fact that an FM station is able to upgrade with relative ease, without competitors or litigation. Nothing less than a dispositive preference for AM daytimers can help to alleviate that great disparity. Furthermore, there are not enough AM daytimers licensed by the Commission to substantially upset the Commission's other regulatory goals. Therefore, a decisional preference would be fair and at the same time would provide room for the Commission's other policies.

2. The Commission Should Avoid Creating a Reverse Preference

15. While no record exists of this data, the case law indicates that the AM daytimer preference has only been awarded on one or two occasions. More frequently, the AM daytimer has gone into the comparative hearing as the central target of litigation from the other, less preferred, applicants.¹⁰ In the past, ALJ's have allowed unbridled discovery and requests for issues against AM daytimers. Moreover, because an AM daytimer is an actually operating business, it is far more vulnerable to the attacks by applicants who exist only on paper. Laundry lists of purported derelictions can be compiled by competing applicants and soon, what was once a harmless inconsistency has mushroomed into "misrepresentation", and what once was a preference has become a deficit.

16. This phenomena is common in multi-party litigation as less preferred applicants focus all litigation efforts against the comparatively superior

¹⁰ See, e.g., Henry R. Malloy, Jr., 6 FCC Rcd 2247 (ALJ 1991); Bible Broadcasting Network, 7 FCC Rcd 432 (Rev. Bd. 1992); J. T. Parker Broadcasting, Corp., 4 FCC Rcd 7764 (Rev. Bd. 1989).

applicant. It was apparent in the rise of the so-called “sham” application doctrine that arose to counter the Commission’s minority and female preferences. As that doctrine expanded, there occurred a gradual decline of minority and female applicants because they could not afford the risks and costs of shouldering the added discovery and issue burdens. In the end, the litigation toll actually gave rise to a “reverse preference” for white, non-integrated males with no Commission preferences. Such applicants have little or no discovery conducted against them and few, if any, issues requested against them. In a litigation environment they will either win in a battle of attrition, or they will wear down their more preferred competitors into accepting a settlement.

17. The Bechtel court chided the Commission for not being able to point to a single instance in which an applicant who won the station on the basis of an integration proposal and continued to operate the station as promised for an appreciable period of time.¹¹ However, in Henry R. Malloy, Jr., *supra*, an AM daytimer station was continuously operated by the same owner after it was won in a 1981 comparative hearing.¹² Later, in the course of attempting to upgrade the station to an FM facility using the AM daytimer preference, the applicant became the sole focus of issue litigation by competitors.¹³ Cases like this make it clear that without a dispositive preference, AM daytimers will be reluctant to expose themselves to the risk of having their years of community service denigrated by opposing applicants who exist solely on paper.

18. In sum, if the Commission is to provide the relief that is needed for AM daytimers, it must provide a fully decisional preference that will bring some

¹¹ Bechtel v. FCC, 10 F 3rd 875 at 879.

¹² Henry R. Malloy, Jr., 6 FCC 2d 2247 at 2248 ¶¶ 7-9.

¹³ Henry R. Malloy, Jr., 6 FCC 2d at 2247 ¶ 5.

equilibrium to the turbulent waters of comparative proceedings. Sound business planing and expansion cannot be accomplished without some degree of certainty that deserving AM daytimers will be awarded the construction permits.

III. CONCLUSION

19. All of the policy reasons underlying the Commission's AM daytimer preference remain in force. If anything, the economic downturn of the last couple of years has increased the hardships of AM daytimers. Additionally, the stations allotted in the 80-90 proceeding have increased the competition against AM daytimers in the small communities which they serve. The AM daytimer preference is objective and addresses all of the Bechtel court's major concerns for predictability while avoiding the pitfalls of integration. Therefore, Miracle Radio respectfully requests that the Commission continue its AM daytimer preference policy and make that preference fully dispositive in comparative hearings.

WHEREFORE, Miracle Radio, Inc. respectfully requests that its *Comments* be accepted and that the Commission maintain and strengthen the AM daytimer preference in comparative broadcast proceedings.

July 21, 1994

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Respectfully Submitted,

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